

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,325

ALVIN T. MORRISON,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

282

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether an indictment should be dismissed as duplicitous when it is framed in the terms of the statute, using the conjunctive to enumerate several acts and the charge is for one specific act; and, when the same indictment charges two defendants, yet both are accused of different acts.
2. Whether there was a denial of due process due to the lapse of five months from the alleged criminal act to the arrest and a further delay of six months until trial when the accused is prejudiced by this delay.
3. Whether the U.S. Attorney has a duty to grant immunity to a witness involved in the narcotics transaction when the indictment against that witness has been dismissed, if the proffer is made that the witness will testify in favor of the accused.
4. Whether it is error for the trial judge to refuse to instruct the jury on the absent witness rule when the witness was peculiarly available to the government and was directly involved in the transaction.

5. Whether it was error for the court to warn a witness that he could refuse to testify if the witness believed that his testimony might tend to incriminate him, if the indictment had been dismissed against the witness and the testimony would concern the acts which were the subject of that indictment.

6. Whether uncorroborated testimony as to possession of narcotics is sufficient for conviction under the Harrison Narcotics Act, 26. U. S. C. 4704 (a).

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*Cases principally relied upon.

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TEXTS

60 Columbia Law Review 858 (1960).

2 Wigmore on Evidence, 285, 3rd edition, 1940.

8 Wigmore on Evidence, 2273, McNaughton Revised Edition, 1961.

STATUTES

26 U. S. Code Annotated 4704 (a).

18 U. S. Code Annotated 1406.

D. C. Code 23-110 (1961 ed.)

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BRIEF FOR THE APPELLANT

ALVIN T. MORRISON,

Appellant,

V.

UNITED STATES OF AMERICA,

Appellee.

No. 19,325

JURISDICTIONAL STATEMENT

Appellant was indicted and tried in the United States District Court for the District of Columbia upon a one count indictment in which he was charged with violation of 26. U. S. C. 4704 (a), possession of a narcotic drug. He was tried before a jury, found guilty

and sentenced on April 9, 1965, and thereupon, petitioned for leave to appeal in forma pauperis to this Court. The petition was granted by the District Court on April 13, 1965. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

Alvin T. Morrison was indicted by the Grand Jury along with a co-defendant, Robert Lee Hoffman, on a charge of violation of the Harrison Narcotics Act, 26 U.S.C. 4704 (a). The co-defendants were charged with possession of narcotics on April 7, 1964. The appellant was arrested on September 11, 1964, the indictment was filed on November 9, 1964, he was arraigned on November 13, 1964, and without counsel, pled not guilty.

Counsel was appointed on December 4, 1964. Motion on behalf of the defendant Morrison to dismiss the indictment on grounds of duplicity, was argued and denied on January 29, 1965. The indictment against the co-defendant, Hoffman, was dismissed by the government on February 5, 1965.

The appellant was tried before a jury on February 25, March 1 and March 2, 1965.

The principal witness for the prosecution was Officer Carl

W. Brooks, an undercover agent for the Metropolitan Police Department. Officer Brooks testified that he gave \$6.00 to Robert L. Hoffman in the B & B Snack Bar on April 7, 1964 at 1:05 p. m., that he saw Hoffman give appellant five dollars, receive fifty cents in change and that Brooks saw Morrison give Hoffman a quantity of capsules.

The informer for the police, Earnest Tomlinson, an admitted user of narcotics, testified that he saw Brooks give Hoffman the money who, in turn gave it to the appellant. Tomlinson did not testify that he saw the appellant with any capsules. (Tr. 106)

Appellant took the stand in his own defense, testified that he worked the night hours at the B & B Snack Bar (Tr. 189) that the shop did not open until 3:00 p. m., that he was never in the shop prior to 8:00 p. m., and was not there at 1:05 p. m. on April 7, 1964. However, the accused could not recall where he was on the date in question (Tr. 190).

Counsel for the defendant called Robert L. Hoffman as a witness, but after the prosecutor explained his rights against self-incrimination (Tr. 207), and the court so instructed him, the witness refused to testify. (Tr. 211-213) Defense counsel requested

that the Assistant U. S. Attorney grant immunity to Hoffman, however this was refused. (Tr. 209-211, 213-214).

The court refused to give an instruction on the missing witness at the request of counsel for the defendant. (Tr. 272-276). However, the prosecutor argued to the jury that the defendant could have called Hoffman. Objection was raised and the court explained to the jury that the defendant had called the witness but that he had refused to testify. (Tr. 316-318).

The jury returned a verdict of guilty. A sentence of 9 to 27 months was imposed and this appeal was noted.

STATEMENT OF POINTS

1. It was error to deny appellant's motion to dismiss the indictment because the indictment is duplicitous in that it is identical to the indictment of the co-defendant, it is stated in the language of the statute, however in the conjunctive rather than the disjunctive, and it does not inform the defendant of the charges against him.

2. There was a denial of due process of law for the following reasons:

a. A purposeful delay of five months from the alleged offense to the swearing out of the warrant.

b. Defendant was arrested on September 11, arraigned on November 13, and counsel was not appointed until December 4.

c. Defendant announced ready for trial on January 4, 1965. Trial was delayed until February 25, 1965, once at the request of the Government, other times due to the crowded calendar, but no delay was caused by the defendant.

d. Defendant was convicted on the testimony of an undercover agent whose recollection was refreshed by a notebook. This testimony was uncorroborated as to the possession of narcotics. (Tr. 42-47).

e. Defendant was prejudiced by the delays as he was unable to recall his whereabouts on the time and date in question.

3. It was error for the court to warn the witness, Hoffman, called by the defendant, who had been a co-defendant, of the fifth amendment protection against self-incrimination as the indictment against Hoffman had previously been dismissed (Tr. 212).

4. It was error for the court to refuse to instruct the jury on the missing witness rule as requested by the defendant, in that the government did not call Hoffman who had allegedly made the purchase from the defendant and he was peculiarly available to the government (Tr. 272-276).

5. It was prejudicial error for the prosecutor to argue to the jury that counsel for defendant did not call Hoffman as a witness, when in fact, counsel for defendant had called Hoffman out of the presence of the jury (Tr. 316).
6. It was prejudicial error for the government to refuse to grant immunity to the witness Hoffman under 18 U.S.C.A. 1406 as requested by the defendant when the government would have suffered no detriment in that the indictment against Hoffman had previously been dismissed (Tr. 209-211, 213-214).
7. There was a failure of corroboration in that the person who allegedly made the purchase did not testify and the only witness who testified as to possession of narcotics was, according to his notes, engaged in making another purchase at the exact time. (Tr. 66-67, 89) The material discrepancies in the testimony of this witness should have resulted in a directed verdict of acquittal.

SUMMARY OF ARGUMENT

The indictment did not properly inform the defendant of the charges against him in that it was duplicitous, setting forth the charges in the language of the statute, but substituting the conjunctive for the disjunctive. It was also duplicitous in that the one indictment named two defendants, but did not inform the appellant whether he or the co-defendant, or both, sold, or purchased, or dispensed, or distributed, or if either or both were charged with the several enumerated acts.

This prejudice was compounded by the fact that the transaction allegedly occurred on April 7, 1964, yet the complaint was not filed until September 11, 1964.

The Sixth Amendment to the constitution grants the accused the right to be informed of the charges against him. The indictment here listed several charges which he or the co-defendant could have committed five months prior to the complaint and arrest; but, the appellant was not informed of the charges which he had to meet at trial.

There was a denial of due process of law resulting from an unjustified delay of five months from the date of the narcotics transaction to the complaint which precluded the appellant from being

able to recall where he was on the date and time in question, or to prepare a defense. The offense occurred on April 7, 1964 and the complaint was not filed until September 11, 1964.

The principal witness against the appellant was an undercover agent. He testified with a recollection refreshed by a notebook (Tr. 43-44); however, the notes were admittedly in error as to time (Tr. 66, 88-80) and there were other discrepancies in the officer's testimony.

The defendant was available from the time of the transaction, yet he was not arrested or informed of the charge against him for five months. There was another delay of three months before counsel was appointed and another delay of three months until trial. Thus, a total delay of eleven months from the offense until trial, all of which was caused by police and government procedure.

The purchase of narcotics was allegedly made by Robert L. Hoffman with funds supplied by the undercover agent. Hoffman was originally indicted as a co-defendant; however, the charge against him was dismissed prior to appellant's trial.

The officer testified that he gave a sum of money to Hoffman who in turn gave five dollars to Morrison and received fifty

cents change, and that Morrison gave Hoffman a quantity of capsules. (Tr. 23-24)

The evidence also revealed that the appellant had worked in the B & B Snack Bar for approximately two years (Tr. 188) and that one of his primary duties was to provide change for the customers to use in the numerous coin operated machines. (Tr. 188-189)

The notes of the undercover agent indicated that the transaction between Hoffman and Morrison occurred at 1:10 p.m. at precisely the exact same time, the officer was engaged in observing another purchase between two other people. This raises serious doubts as to the ability of the officer to see two transactions, or to his credibility if this recordation was, in fact, an error. (Tr. 66, 88-89)

According to the evidence as presented by the government, the only person with direct knowledge of this transaction was Robert L. Hoffman; however, he was not called as a witness for the government.

The defense called Hoffman, but he declined to testify on grounds that his testimony might be incriminating. (Tr. 211-213) It is asserted that Hoffman was not entitled to claim this privilege in that the charge had been dismissed and the court erred in so instructing him.

Counsel for the defendant then requested the government to grant Hoffman immunity under 18 U. S. C. A. 1406 so that he could be compelled to testify (Tr. 209-211, 213-214). It was urged that Hoffman was the only person with direct knowledge of the transaction; that the granting of immunity would not be a detriment to the government in that the charge had already been dismissed; and, that in the interest of justice, Hoffman's testimony should be heard. The government refused to the prejudice of the appellant (Tr. 207-214).

The trial court refused to instruct the jury on the missing witness in spite of the fact that Hoffman was peculiarly available to the government and his testimony was relevant to material issues (Tr. 272-276).

This error was compounded by the prosecutor's argument to the jury that the defense could have called Hoffman as a witness but did not, a fact entirely false, misleading and highly prejudicial. (Tr. 316-318)

Finally, the case should not have gone to the jury in that the government failed to offer any corroboration of possession of narcotics by the appellant. The informer did not testify to possession (Tr. 106) and the capsules corroborated possession by

Hoffman, not Morrison. This factor coupled with the material discrepancies in the testimony of the undercover agent, failed to establish a prima facie case by the prosecution.

ARGUMENT

I. The Indictment.

The indictment is framed in the conjunctive rather than the disjunctive terms of the statute and reads as follows.

On April 7, 1964, within the District of Columbia, Robert L. Hoffman and Alvin T. Morrison purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, three capsules containing a mixture totaling about 146 milligrams of heroin hydrochloride, quinine hydrochloride and milk sugar.

The language of this indictment did not inform the appellant Morrison of the specific charges against him. The indictment does not reveal whether Morrison or the co-defendant, or both, sold or purchased, or dispensed and distributed, or if either or both were charged with the several enumerated acts.

The Fifth Amendment to the Constitution requires an indictment by the Grand Jury. The Sixth Amendment provided that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

A recent case in point is Russell v. United States, 369 U.S. 749 (1962) (decided along with Shelton v. United States, Whitman v. United States, Liveright v. United States, Price v. United States, all on certiorari from the U.S. Court of Appeals for the District of Columbia Circuit.)

These cases concerned indictments for contempt of Congress and were reversed on one common issue -- the indictments returned by the Grand Jury failed to identify the subject under congressional inquiry at the time the witnesses were interrogated. The Court, at 369 U.S. 769 held that the "vice of these indictments is that they failed... to sufficiently apprise the defendant 'of what he must be prepared to meet' ".

"...where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." (emphasis supplied) citing U.S. v. Cruickshank, 92 U.S. 542, 558, (1875).

In U.S. v. Simmons, 96 U.S. 360, 362, (1877), the Court held that "an indictment not framed to apprise the defendant 'with reasonable certainty of the nature of the accusation against him... is defective, although it may follow the language of the statute. "

U.S. v. Carl, 105 U.S. 611, 612, (1881), the Court held

that "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." (emphasis supplied)

See also:

U.S. v. Hess, 124 U.S. 483, 487 (1887)

Pettibone v. U.S., 148 U.S. 197, 202, 204 (1893)

Blitz v. U.S., 153 U.S. 308, 315. (1894)

Keck v. U.S., 172 U.S. 434, 437 (1898)

Morisette v. U.S., 342 U.S. 246, 270, n. 30 (1951)

In Russell, supra, the Court indicated a most practical and straight-forward reason for holding this broad, sweeping indictment invalid. The Court stated,

"...a grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. (emphasis supplied) 369 U.S. 770

The above quote is included in a footnote to the opinion written by Judge Burger in the case of Crosby v. U.S. No. 18,322, decided November 25, 1964, D.C. Circuit, which

reversed a conviction of assault with a dangerous weapon under a robbery indictment.

In Joyner v. United States, 116 U.S. App. D.C. 76, 320 F2d 778, (1963) a robbery indictment was attacked for duplicity in that the conjunctive was substituted for the disjunctive terms of the statute. The per curiam opinion stated that the attack came too late, citing 12 (b) (2) F.R. Cr. P.

Chief Judge Bazelon's concurring opinion stated, that the "attack is levelled against the possibility that the conviction was based on facts not found by the grand jury. But since appellant failed to make a timely challenge to the indictment, I concur in the court's disposition of the case." 116 U.S. App. D.C. at 77.

The defect in Joyner is not present here, appellant's court appointed counsel below having made a pre-trial motion to dismiss the indictment on grounds of duplicity. This motion was denied by Chief Judge McGuire on January 29, 1965. It was renewed and denied by the trial judge on February 25, 1965.

It is asserted that the defect in the indictment which caused reversal in Russell v. United States, supra, is even more prejudicial in the instant case. This is an alleged dual transaction -- one purchase involving two defendants. Yet, both defendants are

charged in identical indictments using the conjunctive "... purchased, sold, dispensed and distributed..." making it impossible to ascertain which defendant is charged with what specific act or crime. It becomes even more difficult when the alleged transaction occurred on April 7, 1964, 5 months prior to his arrest, almost eleven months prior to the trial and some eight months prior to the appointment of counsel.

II. Denial of Due Process.

There was a denial of due process of law in that there was an unjustified delay of five months from the date of the alleged transaction to the arrest, a further delay of three additional months for the appointment of counsel, and the further delay until trial -- a total of eleven months from the date of the offense until trial; and, further, defendant was prejudiced by this delay in that he was unable to obtain information or witnesses for a defense or to remember his whereabouts on the date and time of the offense.

The under cover officer followed the established procedure of using a notebook to record his 93rd transactions. Officer Brooks testified that he depended upon his notes to refresh his recollection as to each transaction (Tr. 43). The officer further

testified that he reviewed his notes prior to his testimony in court (Tr. 44). However, in spite of his notes, the officer had difficulty in even recalling the date of the alleged transaction (Tr. 45).

There were also numerous discrepancies in the testimony of the police officer. At the time of the transaction, the officer identified the person from whom he made the purchase as John Doe. The description noted at that time was "a Negro male, six foot one or two, 180 pounds, 25 to 27 years, medium brown complexion." (Tr. 67-68).

This description is at considerable variance from that of Alvin T. Morrison given by the appellant in his direct testimony, which it is asserted, is presumptively true in that it was stated in front of the jury and not rebutted. The description is Negro male, 27 years old, 6 foot three, 225-230 pounds, dark brown complexion. (Tr. 188)

Numerous other discrepancies on the part of Officer Brooks are listed below, some minor, some not, primarily to illustrate the defects in the testimony on which this conviction rested.

Brooks testified that he first saw Hoffman, the co-defendant, in the 900 block of 14th Street, N.W. (Tr. 45). However, at the preliminary hearing for Hoffman on October 1, 1964, Brooks testified that he saw Hoffman inside the B & B Snack Bar (Tr. Preliminary Hearing 3-4) and, again, that Hoffman was inside the snack bar when he came in (Tr. Prelim. Hearing 5). *

Officer Brooks estimated the size of the B & B Snack Bar as 25 x 50 feet (Tr. 54). Yet, the actual size, as testified by the owner is 22 x 83 feet (Tr. 267-268).

The officer testified that he saw Hoffman give Morrison a five dollar bill (Tr. 22). However, at the preliminary hearing for Hoffman, Brooks stated that he did not know how much money Hoffman gave Morrison (Tr. 63-64, Tr. Prelim Hearing 15-16).

The notes of Officer Brooks indicated two transactions at the exact same time, both in his presence and witnessed by him (Tr. 66, 88-89). One transaction for the appellant herein, the other from a person named Matarack, both at 1:10 p.m.

Officer Brooks testified that Hoffman was wearing a "greyish car coat" (Tr. 70). At the preliminary hearing, he

*Reference is made here to the transcript of the preliminary hearing for Robert L. Hoffman held on October 1, 1964. There was no transcript of the preliminary hearing for Alvin T. Morrison, according to the Commissioner's notes.

could not recall what Hoffman was wearing (Tr. Prelim. Hearing 7).

The officer could not recall anything as to the time of leaving the scene of the transaction or his arriving home (Tr. 74).

The major discrepancy, at least between the case for the prosecution and that for the defense, concerns the time of the sale -- 1:10 p. m. The defendant introduced evidence to establish that the B & B Snack Bar was not open until 3:00 p. m. The owner so testified, (Tr. 163) the defendant so testified (Tr. 200-201), and photographs of the door, showing the sign, "Open 3:00 p. m. " were introduced (Tr. 165).

This was the only form of alibi which the defendant could offer at trial. Unfortunately, he did not maintain a notebook. Neither did he have a desk pad or a social calendar. He worked seven nights a week, from 8:00 p. m. until 2:00 a. m. Each day was essentially like the ones preceding and the ones that followed. To expect that he would recall where he was at 1:10 p. m. on a certain day eleven months prior to the trial is patently impossible. Yet, he was required to do so in order to prove his innocence.

On page 190 of the transcript, the appellant testified that he never had occasion to be in the snack bar in the early after-

noon and that he did not have occasion to be in the establishment prior to his normal working hours.

When asked where he was at 1:05 p.m. on April 7, 1964, the appellant replied as follows: (Tr. 190)

"A. To the best of my recollection, I was home asleep, or at least home. I don't know about asleep.

Q. Can you remember for a fact where you were on April 7 at 1:00 o'clock?

A. That is a long time ago. I don't think so."

Surely, counsel for the defendant must have been embarrassed to ask such nonsense. Could anyone give anything but those answers when testifying under oath?

The instant case is distinguishable from Cannady v. United States, No. 18,392, (D. C. Circuit, July 14, 1965) in that here the appellant could not recall anything about the circumstances surrounding the offense.

This case is also distinguishable from Bey v. United States, No. 18,612 (D. C. Circuit, July 20, 1965), which involved four transactions, each with a "lengthy confrontation between the appellants and the undercover agent," and, a memory of the agent which was independent of his notebook.

Roy v. United States, No. 18,285 (D. C. Circuit, September 2, 1965) is also distinguishable in that the delay between the arrest and the transaction in Roy was three months and 13 days as opposed to five months for Morrison.

Finally, Powell v. United States, No. 18,315 (D. C. Circuit, August 30, 1965) is also distinguishable in that Powell did not testify and the investigative activities of Officer Moore apparently remained unimpeached. Here, Morrison did testify and numerous discrepancies were noted in Officer Brooks' testimony.

The crux of the difficulty is aptly summarized in Nickens v. United States, 116 U. S. App. D. C. 338, 343, 323 F. 2d 808 (1963), concurring opinion by Judge Wright.

Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system, such a tactic is not available to police and prosecutors.

The conviction was affirmed in *Nickens*, due in part, as stated by Judge Wright that "There was no evidence of missing witnesses, or alibi, or lapse of memory, or other circumstances which could have prejudiced the appellant..." 116 U.S. App. D. C. at 345.

In the instant case, the appellant was prejudiced by his inability to recall the events of the day in question; he was prejudiced by the failure of the witness Hoffman to testify; and, another witness, Robert Bell, was not available for the defense (Tr. 195-198, 203, 276, 291, 293).

It is asserted that this case is a stronger fact situation than Ross v. United States, D. C. Circuit No 17, 877, June 30, 1965, in that here, the sole witness as to possession did not purchase the narcotics directly from the appellant. True, the delay here was only five months from the transaction to the arrest, but the time period itself should not be as significant as the effect of the delay on the defendant.

Not only was the accused unable to recall the day in question, but the undercover agent himself had great difficulty, even with the aid of his notebook.

This record should also disclose "an undue subordination of appellant's interests which should not, at least in a record as barren of reassuring corroboration as this one, result in a sustainable conviction." Ross v. United States, supra, slip opinion p. 3.

III. The Missing Witness.

According to the prosecution's case, the transaction was initiated by the undercover agent, Carl W. Brooks, who gave \$6.00 to Robert L. Hoffman for three capsules. Hoffman then gave \$5.00 to the appellant Morrison and received fifty cents in change. Hoffman and Morrison then walked to the rear of the B & B Snack Bar and Morrison gave Hoffman a "quantity" of capsules. Hoffman, in turn, gave three capsules to Officer Brooks. (Tr. 24-25)

Officer Brooks was the only witness to the entire transaction, being ten feet away when the money was exchanged. (Tr. 21-22) and three feet away when the capsules were passed from Morrison to Hoffman (Tr. 24). However, it should be noted that the officer's notebook indicated that this transaction occurred at 1:10 p.m. The officer was witness to a second transaction between the informer Tomlinson and Matarack, alias Walter Parker, Jr. (Tr. 66), at the very same time.

Robert L. Hoffman was indicted as a co-defendant with the appellant. He pled guilty in another case and this indictment was dismissed on February 5, 1965.

Hoffman was introduced as a government witness but was not called. Counsel for the defense called Hoffman, but after having his rights against self-incrimination explained, he refused to testify.

Counsel for the defendant argued that Hoffman could not be re-indicted and therefore he could not incriminate himself (Tr. 209). However, the Court instructed the witness that he did not have to testify. (Tr. 211-214)

The Defense then requested that the U.S. attorney grant immunity for the testimony of the witness (colloquy in the transcript beginning at p. 207 and extending to p. 214).

The Court's attention is respectfully invited to page 210 of the transcript and the proffer made on behalf of the defendant; yet, in spite of this request for immunity, the trial judge refused to make any effort to obtain immunity or to elicit testimony from the witness.

The primary purpose of a trial, under our system of law, is to seek the truth. Justice cannot function in a vacuum

without the diligent efforts of lawyers - both prosecution and defense - to establish the truth with a high regard for their duty as officers of the Court. The trial judge, has, of course, a higher duty as his role is that of arbiter - not adversarial - otherwise this elusive spectre, truth, be lost and justice thwarted.

In the case at bar, the one man who allegedly had the direct knowledge of what transpired on the day in question was not called by the government and could not be called by the defense. Surely, if truth were the goal in this trial, its course was too easily frustrated.

The prosecution argued that he did not believe the witness would tell the truth and therefore would not grant immunity. This is fallacious in that it belies the theory of the government's case. Government witnesses placed Hoffman at the scene as the chief participant in the transaction. True, Hoffman was a convicted felon and a user of narcotics, but so was the government's witness, the informer Tomlinson. The issue then would have been credibility, tested through cross-examination, with the entire matter squarely before the jury as the decider of the facts - a fair test under our system.

It is asserted that the government had the authority to grant immunity for the witness at no detriment to the public interest; and, that the prosecutor as the representative of the sovereign and guardian of the public interest, had a duty to grant immunity for the testimony of Hoffman in the interest of truth and justice.

Title 18 U. S. C. A. 1406 provides for immunity as follows:

Whenever in the judgment of a United States attorney, the testimony of any witness... is necessary to the public interest, he, upon approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify... But no such witness shall be prosecuted... on account of any transaction... which he is compelled, after having claimed his privilege against self-incrimination.

There is also an immunity statute under the D. C. Code, Title 23-110 which enables the court to grant immunity to a co-defendant. This statute provides as follows:

When two or more persons are jointly indicted the court may, before a defendant has gone into his defense, direct any such defendant to be discharged, that he may be a witness for the United States. An accused party may also when there is not sufficient evidence to put him upon his defense, be discharged by the court, or, if not discharged by the court, shall be entitled to the immediate verdict of the jury for the purpose of giving evidence for the other parties accused with him; and such order of discharge in either case, equally with the verdict of acquittal, shall be a bar to another prosecution for the same offense. (emphasis supplied)

This statute, although not wholly appropriate in that the witness was no longer a co-defendant, would seem to provide authority for the court to formally grant the witness immunity which would preclude further prosecution and remove any reluctance the witness may have against further indictments or prosecution for the same offense. Corrado v. United States 53 U.S. App. D.C. 183, 210 f. 2d 712, 719 (1954) a co-defendant had been granted immunity under 23-110 D.C. Code. In upholding the use of this statute, Judge Miller stated for the court as follows:

The code section is not the source of the trial judge's authority to dismiss a defendant so he may be a witness against his former co-defendants, but is an immunity statute enacted for the benefit and protection of a defendant who is discharged for that purpose before he has been in jeopardy. . . . it seems to us that the statute's draftsmen intended it to provide immunity from a second prosecution for a defendant who would not otherwise be entitled to it because he had not been in jeopardy.

It is also asserted that counsel for the government had a duty to make this witness available to the defense, due to the alleged participation of the witness in the transaction. The prosecutor was in an unique position of total control over the witness. Such a position is tantamount to the possession of exculpatory evidence which the government withholds from the defense. Our

court has held that the government has a duty to reveal such information. In Griffin v. U.S., 87 U.S. App. D.C. 172, 183 F2d 990, 993, (1950) the court held,

However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. "The U.S. attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done." Berger v. U.S. 295 U.S. 78, 88.

The Supreme Court has held that if the prosecutor violates his duty to disclose evidence favorable to the defendant, the conviction will be set aside. Alcorta v. Texas, 355 U.S. 28 (1957), Pyle v. Kansas, 317 U.S. 213 (1943), Mooney v. Holohan 294 U.S. 103, 113 (1935) (dictum)

The Michigan courts have gone even further and held that "The fact that a prosecutor is not willing to vouch for the credibility of a witness does not excuse the failure to call him." People v. Connor, 295 Mich 1, 294 N.W. 74 (1940); People v. Hill, 236 Mich. 672, 211 N.W. 39 (1926)

An article in the Columbia Law Review entitled "Duty of Prosecutor to Disclose Exculpatory Evidence," 60 Col. L. Rev. 858, 870 (1960) summarizes the problem.

It should be recognized that any definition of the scope of the prosecutor's duty must be aimed at obtaining essential fairness to the defendant within the framework of adversarial criminal proceedings... a requirement that a prosecutor disclose exculpatory evidence that might reasonably affect the outcome of the jury's deliberations would not seem to duly compromise the prosecutor's "adversarial" position and would serve the interests of justice.

As a result of the government's refusal to call Hoffman as a witness and the refusal to permit the defense to call Hoffman as a witness, counsel for the defendant requested the court to instruct the jury on the missing witness (Tr. 289-291). This instruction was refused.

Professor Wigmore states,

The witness must be within the power of the party to produce...

When the witness is privileged and the privilege is independent of the party's control, the witness' claim of privilege renders the party unable to use his testimony; but it would seem that the witness should at least have been summoned and asked, for he may waive his privilege. But where the privilege is one which lies within the control of the party himself, it is obvious that the employment of the witness is in fact within the party's power; ... (emphasis in original)
2 Wigmore on Evidence 285, 286 (3rd Ed. 1940)

Where the witness not produced is privileged and therefore might refuse to testify if called, there arises an interesting and complicated problem. . . It here involves also the question whether the accused's failure to call a co-defendant, who would be privileged but competent and whose nonproduction would otherwise be open to inference, can thus be noticed. It would seem that it ought to be - at least unless it appears the co-defendant claims his privilege. 8 Wigmore on Evidence 2273 (3) (McNaughton rev. ed. 1961)

In Cole v. State, 16 Okla Crim. 420, 183 Pac. 734 (1919),

a co-defendant who had already been convicted, was not called as a witness for the defendant and the appellate court approved the inference that his testimony would not have favored the defendant citing Graves v. United States, 150 U.S. 118, 121 (1893)

In Graves, the defendant did not call his wife as a witness and the Court stated that:

The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced would be unfavorable.

Surely, if this principle is correctly applied against the defendant as in the cases cited above, a presumption (or an inference) also arises when the government fails to call a witness within its control.

The witness Hoffman was peculiarly available to the government in every sense of the word. He was in jail and physically available and the government, had the power to grant him immunity and compel him to testify. This failing, the court should then have instructed on the inferences which the jury might draw from this absent witness.

Finally, the prosecutor argued to the jury that the defense failed to call Hoffman as a witness -- that he was available to the defense -- "why doesn't he call him?" (Tr. 316). These statements were false, misleading and highly prejudicial.

Upon objection to this argument, the trial court instructed the jury that Hoffman had been called by the defense but had relied upon the Fifth Amendment. This was told to the jury without objection by the defense counsel, certainly an error on his part, however, the damage had been done by the prejudicial and false argument of the prosecutor.

As the court stated in Berger v. United States, 295 U. S. 78, 88 (1935), the U. S. attorney "... may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is

as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

It is respectfully urged that anyone of these errors arising from the witness Hoffman is prejudicial, and the cumulative effect more than justifies reversal.

APPENDIX

Statutes Cited

26 U. S. Code annotated 4704 (a)

General requirement. - It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

18 U. S. Code Annotated 1406 (1964 Supplement)

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of --

(1) any provision of Part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject

him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. . .

D. C. Code (1961 Edition) 23-110

When two or more persons are jointly indicted the court may, before a defendant has gone into his defense, direct any such defendant to be discharged, that he may be a witness for the United States. An accused party may also, when there is not sufficient evidence to put him upon his defense, be discharged by the court, or, if not discharged by the court, shall be entitled to the immediate verdict of the jury for the purpose of giving evidence for the other parties accused with him; and such order of discharge in either case, equally with the verdict of acquittal, shall be a bar to another prosecution for the same offense.

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,325

ALVIN T. MORRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal From the United States District Court
for the District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 14 1965

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Cr. No. 1008-64

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

- 1) Should the indictment have been dismissed by the trial court because the defendant and another were charged in one count with purchasing, selling, dispensing *and* distributing narcotic drugs as prohibited by the statute?
- 2) Should a conviction for selling narcotics be set aside and the indictment dismissed because of five months' delay between the offense and the arrest, where the undercover officer's identification of the defendant and the circumstances surrounding their transaction was amply corroborated?
- 3) Was the evidence sufficient to support this defendant's conviction of a narcotics offense?
- 4) May a witness refuse to testify under the Fifth Amendment when the subject of the testimony sought from him has once resulted in the return of an indictment against him and that indictment was subsequently dismissed without prejudice?
- 5) May an accused call a witness and compel the Government or the Court to grant that witness immunity from prosecution on the subject matter of his testimony?
- 6) Should the Court have instructed the jury that the Government's failure to call the accused's co-indictee as a witness, or to grant him immunity from prosecution so his testimony could have been compelled, was subject to the inference that the co-indictee's testimony would not have supported the Government's case?
- 7) Did the prosecutor's remarks, in rebuttal of defense counsel's argument to the jury that the Government should have called the co-indictee as a witness, constitute reversible error?

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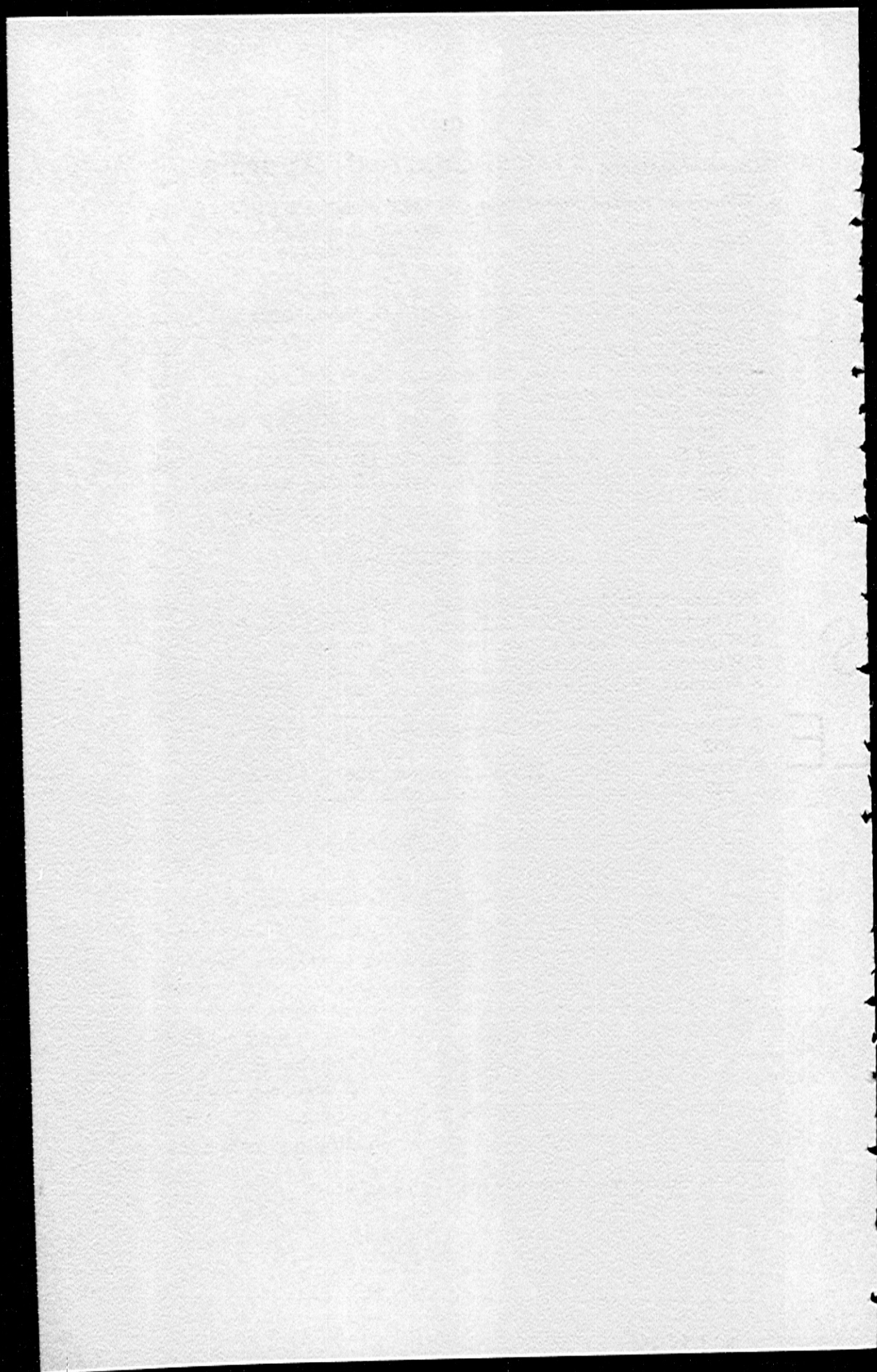
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,325

ALVIN T. MORRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal From the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Jury trial resulted in the conviction of Morrison for a sale of heroin on April 7, 1964, in violation of 26 U.S.C. § 4704a. He was sentenced to imprisonment for nine to twenty-seven months, and subsequently was allowed to proceed on appeal without prepayment of costs.

At the trial Officer Carl W. Brooks testified that he had spent six years as a narcotics agent in the Baltimore Police Department before he began an undercover assignment for the Metropolitan Police on February 17, 1964 (Tr. 12-13). For approximately seven months from that

date, Brooks was introduced to the Washington narcotics traffic as "Tojo", a user of heroin who frequented the vicinity of Fourteenth and U Streets, N.W. During that period he made a total of ninety-three purchases from fifty-four different blackmarket salesmen of the contraband he feigned to crave. (Tr. 41, 43.) Memoranda of each transaction were kept, and Brooks would ordinarily refresh his memory from these contemporaneous records before testifying—as he did in the instant case (Tr. 43-44). One Ernest Tomlinson, a sometime user of narcotics and haunt of Fourteenth Street, fit into Brooks' operation as the man responsible for introducing him to the Washington traffickers (Tr. 14).

Brooks testified that he joined Tomlinson in the B & B Snack Bar on Fourteenth Street at approximately 12:55 P.M. on April 7, 1964 (Tr. 17-18). With Tomlinson was a man known to Brooks only as "Bobby."¹ After a short conversation Brooks asked for three capsules of heroin and gave Hoffman six dollars for that purpose (Tr. 18-19).² Hoffman walked over to the defendant, gave him the five dollar bill he had received from Brooks, received two quarters in change, and watched Morrison move to the rear of the snack bar (Tr. 21-23, 26). When Hoffman and Brooks joined him there, Morrison slipped three capsules to the former who immediately turned them over to Brooks (Tr. 23-25, 152). After witnessing a purchase of drugs by Tomlinson, Brooks and his special employee left the B & B together (Tr. 26-27, 66). Although Brooks did not know the defendant's name at the time of their transaction (Tr. 29, 33, 63), he observed

¹ Robert Hoffman was brought into the courtroom and identified by Brooks as the man he knew as "Bobby" on April 7, 1964 (Tr. 15-16, 62).

² The going rate for a capsule of heroin at this time was one dollar and a half. Hoffman was to act as intermediary in the purchase for Brooks and to keep the price of one capsule for himself (Tr. 19-20). Brooks testified that he gave Hoffman a five dollar bill and a one dollar bill (Tr. 21).

that the seller was wearing a blue change apron and assumed that he was an employee of the snack bar (Tr. 26). On subsequent visits to the B & B, he learned that the employee who had made the sale was Alvin Morrison (Tr. 33-34, 63).³ Warrants were issued for the arrest of Morrison and Hoffman on September 9, 1964. Two days later the defendant was picked up just one block from the place where he had made the sale five months before (Tr. 35).

Ernest Tomlinson was called to testify in corroboration of the statement by Officer Brooks. Tomlinson recalled that he and Hoffman were together in the B & B Snack Bar sometime between 12:30 and 1:30 P.M. on April 7, 1964 (Tr. 96-99, 121-22). Brooks had joined them and given Hoffman two bills, a one and a five (Tr. 104). According to Tomlinson, Hoffman pocketed the one and then gave the "nickel note" to Morrison who was standing nearby and who returned two quarters to Hoffman (Tr. 105-06, 123). He watched Hoffman, Brooks and the defendant walk to the rear of the bar, but it does not appear from the record that he saw what then transpired because he was preoccupied with a purchase of his own from one Walter Parker (Tr. 106-09, 123-24). Tomlinson testified further that he had been to the B & B prior to April 7, and that he knew Morrison was employed there (Tr. 103, 116).

The defendant testified in his own behalf that he was employed as night manager of the B & B Snack Bar in April of 1964, and for two years preceding that date (Tr. 188). He denied that he had ever been in the B & B during the early afternoon or that he had ever sold narcotic drugs; moreover he claimed that he "was home asleep, or at least home" at 1:00 P.M. on April 7. At counsel's urging he then stated he was not sure where he had been at that time. (Tr. 190.) On cross-examination, Mor-

³ Detective Somerville evidently went to the snack bar to ascertain the defendant's name some weeks after the transaction (Tr. 33, 63).

rison admitted that he customarily wore a change apron when he worked, and that a replacement had not been found for some weeks after the afternoon manager's discharge in February (Tr. 190-97). He denied, however, that he had ever helped to fill that afternoon vacancy.

Robert Butler, owner of the B & B, testified that his business was not open before 3:00 P.M. on any given day in April (Tr. 167-71). Butler implied that he had the only key to the shop at this time, and he did state that it was his practice to visit the B & B regularly between 2:30 and 3:00 P.M. each day (Tr. 171, 179). Although he had fired the day manager in March, he did not believe that Morrison had ever worked as a replacement (Tr. 172); in fact, Butler stated, he had worked that shift himself until a new manager was hired (Tr. 177). Subsequently, he contradicted this assertion when he testified that he had worked only once or twice in March and had gone to the Fourteenth Street address each day in April for fifteen or twenty minutes to check on things—not to work (Tr. 179).

Defense counsel requested that the Court excuse the jury and call Robert Hoffman to the stand so his "rights [could be] explained to him" (Tr. 207).⁴ This was done after counsel explained that Hoffman had shortly before expressed his reluctance to testify "one way or the other." The Government attorney stated that an indictment against Hoffman arising out of the April 7 incident had been dismissed after he pleaded guilty to another narcotics charge. Furthermore, Hoffman was presently serving a sentence of two to eight years. (Tr. 207-08.) The Court noted that the Statute of Limitations had not run on the dismissed April 7 charge, and then acceded to the defense counsel's suggestion that he advise Hoffman of his right not to incriminate himself (Tr. 209, 211-

⁴ In his brief the appellant states, inaccurately, that the prosecutor explained to Hoffman his right not to testify. Brief for appellant, p. 6. In fact, the Court undertook this task only after defense counsel requested it (Tr. 211-14).

14). When Hoffman was asked if he believed his testimony might incriminate him, he replied affirmatively and elected to invoke the Fifth Amendment (Tr. 213). The Court refused to compel his testimony.

Trial counsel for the defendant also requested that the Government grant—or the Court order the Government to grant—Hoffman immunity from prosecution on the April 7 sale to Brooks (Tr. 209). Amid confusion about his authority to do so, but supported by his belief that Hoffman would testify falsely if given the immunity Morrison requested for him, the prosecutor declined to consider it (Tr. 208-211). The Court stated that it did not believe it had the power to require the executive branch to grant the immunity requested for Hoffman by the defendant, and denied the request (Tr. 214).⁵

On the theory that only the Government could compel Hoffman's testimony by granting him immunity, the defendant asked the Court to instruct the jury that the Government's failure to call Hoffman to testify was subject to the unfavorable inference that if he had been called he would not have supported the Government's case (Tr. 272-76). This request was denied because, as the Court stated, the missing witness rule does not apply when a witness is available to both parties as Hoffman was here (Tr. 273). Defense counsel did argue in summation, however, that the Government's failure to call Hoffman should lead the jury to infer that his testimony would have been unfavorable to the prosecution (Tr. 306-07). In rebuttal, the prosecutor sought to offset the effect of that argument by pointing out that

⁵ In his opening statement to the jury, defense counsel had announced his intention to call Hoffman who would purportedly testify that he never received money from Officer Brooks on April 7, 1964, and, furthermore, that he had never received narcotics from the defendant (Tr. 156-57). At a later bench conference, counsel mentioned that he spoke with Hoffman on December 29, 1964 (when he was still under indictment) and obtained a detailed statement denying that he had received narcotics from Morrison (Tr. 210). On April 7, 1965, however, Morrison did not wish to reaffirm that story (Tr. 213).

the witness was equally available to call by both parties; moreover, he stated, the defendant should himself have called Hoffman as a witness (Tr. 316). At this point the Court interrupted the rebuttal and asked both counsel if they would object to a clarification of Hoffman's part in the trial. Defense counsel replied that he had no objection to this proposal, and the Court then explained that the defense had called Hoffman when the jury was excluded from the courtroom and that Hoffman had refused to testify by invoking his Fifth Amendment right. (Tr. 316-18). Trial counsel for Morrison again stated that he had no objection to this procedure (Tr. 316-17, 318).*

STATUTES AND RULES INVOLVED

Title 18 United States Code, Section 1406, provides:

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II or subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotics Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make applica-

*Tactically, counsel may have hoped to show the jurors that he had attempted to call Hoffman as a witness while the Government had not—thus reenforcing his argument in summation that Hoffman's testimony would have been unfavorable to the Government.

tion to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Title 23 D.C. Code, Section 110, provides:

When two or more persons are jointly indicted the court may, before a defendant has gone into his defense, direct any such defendant to be discharged, that he may be a witness for the United States. An accused party may also, when there is not sufficient evidence to put him upon his defense, be discharged by the court, or, if not discharged by the court, shall be entitled to the immediate verdict of the jury for the purpose of giving evidence for the other parties accused with him; and such order of discharge in either case, equally with the verdict of acquittal, shall be a bar to another prosecution for the same offense.

Rule 7(c), Federal Rules of Criminal Procedure, provides in pertinent part:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal

commencement, a formal conclusion or any other matter not necessary to such statement. . . .

Rule 8(b), Federal Rules of Criminal Procedure, provides:

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

SUMMARY OF ARGUMENT

This Court has held that where a statute denounces several acts in the disjunctive *or*, one count of an indictment may charge all the proscribed acts in the conjunctive *and*. The use of the conjunctive, therefore, does not render the indictment defective as duplicitous or as an inadequate statement of the charges under the *Russell* case. Had the defendant sought a bill of particulars before the trial, he would have increased the plausibility of his claim that he was not sufficiently apprised of the charge against him, and would have received at least a part of the information he alleges should have been contained in the indictment.

This is not a case in which the possibility of an erroneous conviction is so great that the Court should exercise its supervisory powers to overturn the verdict of twelve jurors who thought Morrison was guilty beyond a reasonable doubt. Unlike *Ross*, the delay between the offense and the arrest was only five months; the undercover agent's testimony was corroborated by an informant with respect to time, place, circumstance, *and identity*; the agent had five years of experience in narcotics work and did not have to refresh his recollection of Morrison's identity; the defendant did not make an unequivocal claim that he could not remember the day in question;

and he was able to present a defense which, if believed, would have entitled him to an acquittal.

It should be settled by now that the uncorroborated testimony of an undercover agent is sufficient to send the narcotics case to a jury. Under the circumstances, however, that question is purely a hypothetical one. Furthermore, the Court did not err when it sustained the witness Hoffman's Fifth Amendment claim. A previous dismissal of the indictment against him did not prevent his reindictment and conviction for participation in the defendant's sale of narcotic drugs.

A reading of the immunity statutes, relied upon by the appellant for his claim that he is entitled to compel a witness' testimony and grant him immunity from prosecution on the matters revealed, shows that this extraordinary power is entrusted solely to the Government. Immunity statutes are intended by Congress as an aid to law enforcement, not as a means of allowing defendants to call witnesses who would be only too happy to provide favorable testimony in return for their own immunization from prosecution. This possibility of collusion defeats any claim by the appellant that he was entitled to compel, or have the Government compel, Hoffman's testimony by a grant of immunity.

Nor should the Government's failure to call Hoffman as a witness entitle the accused to a missing witness instruction. Hoffman was himself subject to prosecution for his participation in the illegal transfer of narcotics, and no party is required to suffer the effects of an adverse instruction for his failure to call a hostile witness. Moreover, if a witness stands on his Fifth Amendment right and declines to testify, his testimony becomes unavailable to both parties. Therefore, an instruction to the jury that his testimony, if called, would have supported either party is unjustified. Finally, the prosecutor's remarks to the jury that Hoffman was equally available for call by the defendant were proper *in rebuttal* of the defense counsel's questionable argument that the Govern-

ment should have called a witness who had invoked the Fifth Amendment.

ARGUMENT

- I. The indictment was not defective in charging the appellant and another with the purchase, sale, dispensation and distribution of narcotic drugs as prohibited by the statute.**

Appellant was convicted for a violation of 26 U.S.C. § 4704(a) which provides that "it shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package" (Emphasis added.) A one count indictment returned by the Grand Jury on November 9, 1964, charged in the full language of the statute that Morrison had "purchased, sold, dispensed and distributed" such drugs.⁷ Defense counsel made a pretrial motion to dismiss this indictment as duplicitous because, in his view, the use of the conjunctive *and* resulted in charging the defendant with several crimes (Tr. 3-4), whereas at common law, and according to the Federal Rules of Criminal Procedure, only one offense may be alleged in each count of an indictment.⁸ See *United States v. Crummer*, 151 F.2d 958, 963 (10th Cir. 1945), *cert. denied*, 327 U.S. 785 (1946); F.R. Crim. P. 8(a). Moreover, the defendant claimed that the indictment was insufficient to apprise him of the nature of the charge he would have to meet as contem-

⁷ The entire indictment reads as follows:

On or about April 7, 1964, within the District of Columbia, Robert L. Hoffman and Alvin T. Morrison purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, three capsules containing a mixture totaling about 146 milligrams of heroin hydrochloride, quinine hydrochloride and milk sugar.

⁸ Duplicity is defined by Black as the "technical fault, in pleading, of uniting two or more . . . offenses in the same count of an indictment" Black, *Law Dictionary* (4th ed. 1951).

plated by the Supreme Court in *Russell v. United States*, 369 U.S. 749 (1962).

This Court has upheld an indictment drawn in the conjunctive, *and*, when the statute under which the prosecution was brought denounced several acts in the disjunctive, *or*. Proof at trial of any one of the acts charged conjunctively in one count will then support a conviction for the offense. *District of Columbia v. Hunt*, 82 U.S. App. D.C. 159, 163-64, 163 F.2d 833, 837-38 (1947); *O'Brien v. United States*, 27 App. D.C. 263, 267-70 (1906); see *Joyner v. United States*, 116 U.S. App. D.C. 76, 320 F.2d 798 (1963).⁹ This appears to be the practice and the rule in the federal courts. See, e.g., *Crain v. United States*, 162 U.S. 625, 636 (1896); *Arellanes v. United States*, 302 F.2d 603, 609 (9th Cir. 1962); *Bennett v. United States*, 285 F.2d 567, 571-72 (5th Cir. 1960); *Troutman v. United States*, 100 F.2d 628, 631 (10th Cir. 1938); *Ackley v. United States*, 200 Fed. 217, 221 (8th Cir. 1912); *Greenberg v. United States*, 30 F.R.D. 164, 169-70 (S.D.N.Y. 1962). And in a similar case, the Tenth Circuit has recently held that the use of the conjunctive in one count of an indictment to charge an appellant with receiving, concealing, selling, *and* facilitating the transportation of a narcotics drug was proper.¹⁰ That Court stated at 455 of its opinion:

The law is settled that when a statute denounces several acts as a crime, an indictment or information drawn in the language of the statute is not duplicitous if all the acts are pleaded conjunctively in one count.

⁹ In *Joyner* the Court noted that the defendant had been charged "in the full language of the statute, substituting, of course, the conjunctive *and* for the disjunctive or where necessary" and went on to cite with evident approval 4 Wharton, *Criminal Law & Procedure* (1957), § 1798. That section provides in pertinent part:

It is not uncommon for a statute to denounce as an offense two or more separate or distinct acts, things, or transactions enumerated therein in the disjunctive, and it is the general rule that in such a case the whole may be charged conjunctively, and the defendant found guilty of either one

¹⁰ *Cordova v. United States*, 303 F.2d 454 (10th Cir. 1962).

Appellant has cited no case to the contrary. And to whatever extent he suggests that the disjunctive is to be preferred to the conjunctive,¹¹ it should be noted that an indictment may be defective for vagueness if drawn in the former, even though it follows the exact language of the statute. See, e.g., *Heflin v. United States*, 223 F.2d 371, 373 (5th Cir. 1955); *Ackley v. United States*, 200 Fed. 217, 221 (8th Cir. 1912); *United States v. Wells*, 180 F. Supp. 707, 709 (D. Del. 1959).

If the use of the conjunctive *and* to charge Morrison with the acts denounced by the statute did not render the indictment defective, the remaining question is whether the indictment was otherwise subject to dismissal for insufficiency. The traditional test of the sufficiency of an indictment is whether it adequately apprises the accused of the charge so that he may prepare his defense, and whether it is certain enough to enable him to plead a resulting acquittal or conviction in bar of a future prosecution. E.g., *United States v. Debrow*, 346 U.S. 374 (1953); *Hudson v. United States*, 97 U.S. App. D.C. 153, 229 F.2d 36 (1956). Rule 7(c) of the Federal Rules of Criminal Procedure was not intended to denigrate these standards, but it was designed to "eliminate technicalities in criminal pleading."¹² It provides in part:

The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged It need not contain . . . any other matter not necessary to such statement.

The present indictment alleges the commission of all the elements of the offense:¹³ (1) the transfer by purchase,

¹¹ Appellant's Brief, p. 14.

¹² *United States v. Debrow*, *supra* at 376.

¹³ Before the 1946 enactment of the Federal Rules of Criminal Procedure, courts often measured the appraisal function of an indictment by looking to see if the "essential elements" of the crime had been alleged. See *Hagner v. United States*, 285 U.S. 427, 433 (1932). Rule 7(c) provides for a statement of the "essential facts" which may be thought to correspond to the older test.

sale, dispensation or distribution, (2) of a narcotic drug, (3) not in or from the original stamped package. In addition to the elements of the crime, there are specific allegations about the date and jurisdiction, as well as the name of a second participant and the amount of heroin involved. Without doubt, this factual data would enable Morrison to plead a resulting acquittal or conviction in bar of a second prosecution for a like offense. His principal contention, however, is that the allegations contained in the indictment did not sufficiently apprise him of the nature of the accusation against him. Arguably, the fact that he did not request a bill of particulars giving the exact time and place of the transfer, and the names of other participants or witnesses, should dispose of his claim that he was misled or prejudiced by the alleged dearth of information in the indictment.¹⁴ Without resting on that ground, however, the appellee submits that this indictment, as drawn, was adequate. From the allegations therein, Morrison knew that he was being charged as a principal, along with Robert Hoffman, in the illegal transfer of three capsules of heroin on a specific date and within the District of Columbia. His claim of right to know from the indictment, rather than from a bill of particulars, the specific part he played in the illegal transfer, i.e., whether he purchased, sold, distributed or dispensed the contraband, was impliedly rejected by the body of law approving the use of the conjunctive in cases involving statutes which denounce several acts in the disjunctive.

Appellant Morrison does not contend that Hoffman was

¹⁴ In *Nelson v. United States*, 109 U.S. App. D.C. 392, 393, 288 F.2d 376, 377 (1961), this Court observed that the trial judge had denied an appellant's pretrial motion to dismiss the indictment and added in reference to the appeal from that ruling: "Had appellant filed and had the trial court denied a motion for a bill of particulars, his argument as to the insufficiency of the allegations [in the indictment] might have been entitled to greater weight." Rule 52(a), of course, provides that any error of defect not affecting substantial rights shall be disregarded.

improperly included in the indictment with him.¹⁵ He does, however, rather curiously attempt to bolster his position by alleging that the inclusion of a co-defendant in a single count indictment compounded his confusion. If, of course, he alone had been indicted and charged in the full language of the statute with purchasing, selling, dispensing *and* distributing, he would in fact, have known less than he did by the inclusion of the name of a co-indictee with whom the transaction of April 7 presumably took place.¹⁶ The question of the sufficiency of this indictment, therefore, is not advanced to the appellant's advantage by the fact that Robert L. Hoffman's name was included in it.

The Supreme Court's opinion in *Russell v. United States*, 369 U.S. 749 (1962), hardly seems designed to overthrow the accepted practice of allowing a Grand Jury to return an indictment alleging in a single count the violation of a statute by all or several of the means denounced in it. The Court there held only that failure to include an essential fact rendered the indictment defective because it inadequately apprised the accused of the charge against him. The three essential facts constituting an offense under 26 U.S.C. § 4704(a) were stated with particularity in the present indictment. And nothing said by the Court in *Russell* suggests that the use of the conjunctive to charge the commission of an offense by all the means denounced in the statute renders it similarly defective for inadequately apprising a defendant of the accusations against which he must defend.

¹⁵ Rule 8(b), Federal Rules of Criminal Procedure, provides in pertinent part:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction Such defendants may be charged in one or more counts together

¹⁶ The name of the person to whom a sale, or from whom a purchase, of narcotic drugs was made, *may* be obtained in a bill of particulars. See *Roviaro v. United States*, 353 U.S. 53, 65 n.15 (1957).

- II. The indictment should not be dismissed since the delay between the defendant's sale of heroin and his arrest was necessitated by the needs of undercover investigation, and the identification of Morrison as the seller was amply corroborated.

(See Tr. 12-13, 18-23, 26, 33-34, 42-44, 63, 99, 102-03, 105-06, 116, 167-71, 175-177, 190-01, 195-97, 209-10)

Brooks and Tomlinson both swore that they had seen the defendant in the B & B Snack Bar at approximately 1:00 p.m., on April 7, 1964 (Tr. 18-21, 99, 102). Each knew, or assumed from the change apron that Morrison was wearing, that he was an employee there (Tr. 26, 103, 116); and the owner admitted that he had only two employees, one for the afternoon shift and the other for the night (Tr. 175-177). The defendant himself stated that he was employed at the B & B during April of 1964, and that it was his custom to wear a change apron while on duty (Tr. 190, 197). Brooks and Tomlinson both saw Hoffman pass a five dollar bill to the defendant who kept enough out of it to cover what was then the going price for three capsules of heroin (Tr. 21-23, 105-06). Tomlinson further testified that he saw Hoffman and Brooks with Morrison in the rear of the snack bar where the undercover officer said the transfer took place (Tr. 106). With the help of his supervisor, Detective Somerville, Brooks learned on subsequent visits to the B & B that the man who had sold him the capsules was known as Alvin Morrison (Tr. 33-34, 63); although no subsequent buys were made from Morrison, this is not a case where the undercover agent saw the seller on one occasion only, or where his identity could not be easily verified. In addition to the supporting testimony of Tomlinson covering time, place, circumstance and identity, this record reveals through the testimony of defense witnesses the existence of facts corroborating Brooks' identification—such as Morrison's employment and dress. On the other side, the defense produced evi-

dence which, if credited, lent support to Morrison's testimony that he had never entered the B & B in the early afternoon and, therefore, could not have been the black-market salesman Brooks thought he was. Robert Butler asserted, between contradictions about his own work habits during March and April, that he had the only key to open the B & B in April; consequently he knew his place of business had not been open before 3:00 P.M. on any day that month (Tr. 167-71).

Is this a case in which the risk of an erroneous conviction is so great as to require this Court, in the exercise of its supervisory power, to set aside the jury's verdict and to dismiss the indictment? The defendant alleges that the Government's deliberate delay for five months before arresting him after the sale made it difficult for him to recall his whereabouts on the afternoon of April 7, and, further prejudiced him in that he could not locate the newly hired afternoon manager of the B & B who might have cleared him. See Appellant's Brief, pp. 24-25.

The reasons which impelled the delay are those inherent in any undercover operation that depends for its effectiveness on the continued anonymity of an agent who will attempt to identify, at first the smaller and subsequently the larger, sources of narcotics supply in this city. From this record and others like it, the Court well knows the difficult problem of law enforcement in an area where there are understandably few complainants, and where success perforce depends upon the expensive and dangerous maintenance of an agent's guise as a user. See *Powell v. United States*, D.C. Cir. No. 18,315, decided August 30, 1965; *Ross v. United States*, D.C. Cir. No. 17,877, decided June 30, 1965. The appellant's claim of prejudice in this case is open to serious question. He did not state unequivocally that he could not remember where he was on April 7 in the early afternoon—he was at home asleep or, in his words, "at least at home" (Tr. 190). Secondly, the witness Morrison says he could not find because of the police decision to delay his arrest had left his employment at the B & B before June when Morrison was him-

self fired (Tr. 195-96). Insofar as the witness' departure from the B & B, therefore, may be thought to mean that Morrison could not locate him thereafter, the delay from June to September should not be attributable to the Government. See *Mackey v. United States*, D.C. Cir. No. 18,525, decided June 30, 1965 (two month delay not likely to be unreasonable). Furthermore, if the snack bar was not open at 1:00 P.M. on April 7, as the defense contended, the witness could have provided only cumulative testimony to that fact.¹⁷

Appellant relies primarily upon *Ross v. United States*, *supra*, where there was a seven month delay, an unequivocal claim of lack of memory, a defendant without regular employment to help fix the date of his alleged sale, and, apart from the narcotics, no corroboration of the agent's testimony. As this Court has pointed out, the "majority view there [in *Ross*] turns finally on the lack of adequate corroboration of the testimony of the undercover officer." *Powell v. United States*, *supra*, p. 6. The five month delay here is compared favorably with *Ross* and is approximately the delay approved in *Powell* where there was also corroboration of the agent's testimony. Moreover, as in *Bey & El v. United States*, D.C. Cir. No. 18,612, decided July 20, 1965, the record of this trial shows the opportunity for several confrontations between the undercover agent and the seller (Tr. 33-34, 63); a trained police officer working in an undercover capacity (Tr. 12-13); and an independent recollection of the transaction after reviewing the notes (Tr. 43). Finally, the thrust of this appellant's defense was in no way stifled by the delay since both he and his employer testified that the snack bar was not open at the time Brooks and Tomlinson claimed the transaction occurred. Twelve jurors believed, beyond a reasonable doubt, that it was; and with due regard for the interest of the accused to have notice of the charges against him as soon as practically possible, the appellee submits that this Court need not

¹⁷ It was, of course, never established that a new afternoon manager had been hired by April 7.

exercise its supervisory power to achieve a just decision in this case.¹⁸

III. The corroborated testimony of a narcotics agent is sufficient to support a guilty verdict.

Brooks' testimony was corroborated by Tomlinson with respect to time, place, circumstance, and identification of the defendant. See Counterstatement of the Case and Argument II. Taking the view of the evidence most favorable to the Government, see *Glasser v. United States*, 315 U.S. 60, 80 (1942), there was substantial evidence of Morrison's guilt and the jury's verdict was warranted.

In a "Question Presented," which evidently he does not care to argue,¹⁹ appellant implies that the uncorroborated testimony of a narcotics agent is legally insufficient to justify a conviction. Under the facts of this case, that question is as hypothetical as its legal implication is wrong. See *Wilson v. United States*, 118 U.S. App. D.C. 319, 320, 335 F.2d 982 (1964) (uncorroborated testimony of an undercover agent is sufficient to convict of a narcotics offense).

IV. A witness may refuse to testify about an illegal transfer of narcotics when there is no bar to his later prosecution for participation therein.

(Tr. 207)

In his brief the appellant states, inaccurately, that the prosecutor explained to Hoffman that he could

¹⁸ The strength of the Government's case as demonstrated on the present record should be adequate to allow a decision on the merits of this issue. Defense counsel was also alert to the *Ross* issue at the time of trial (Tr. 209-10), and, therefore, attempted to detail the prejudice to his client for this record (Tr. 42-44, 190-01). If the appellee's position is sustained, in the dimensions of the case for the prosecution were of such a character as not to warrant the use of this Court's supervisory power, a remand for a hearing on the prejudice issue is unnecessary.

¹⁹ Appellant states the question but does not present argument on it. Appellant's Brief, p. 3.

refuse to testify in this case. Appellant's Brief, p. 6. The fact is that defense counsel specifically requested the Court to excuse the jury, bring the witness into the courtroom, and "explain" his rights to him (Tr. 207). If, then, his "Question Presented" implies that the witness Hoffman should not have been advised of his rights unless he personally invoked the Fifth Amendment privilege that contention should be denied out of hand. See *Fuller v. United States*, 53 App. D.C. 88, 91, 288 Fed. 442, 445 (1923).

If, however, the appellant's "Question Presented" is only intended to mean that a witness may not refuse to testify on a matter because an indictment concerning it has been dismissed at Government request, he is not supported by the courts in his desire to override that witness' freedom from compulsory self-incrimination. A *nolle prosque*, or dismissal at Government instigation under F.R. Crim. P. 48(a), does not bar a future prosecution. *Mann v. United States*, 113 U.S. App. D.C. 27, 31 n. 12, 304 F.2d 394, 398 n. 12, *cert. denied*, 371 U.S. 896 (1962); *Dortch v. United States*, 203 F.2d 709, 710 (6th Cir. 1953); *United States v. Fox*, 130 F.2d 56, 58 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942); *District of Columbia v. Buckley*, 75 U.S. App. D.C. 301, 304, 128 F.2d 17, 20 (1942), at least when the dismissal is not with prejudice or after jeopardy has attached. And the possibility that Hoffman might have been reindicted was not at all remote had his testimony been compelled and had it revealed facts about him, his relationship to Morrison, or the transaction itself that were unknown to the Government at the time of the original dismissal. The trial court, therefore, properly refused to compel the witness' testimony about the April 7 transaction—for his answers could both have supported a conviction and have furnished a link in the chain of prosecution by revealing its merit. *Hoffman v. United States*, 341 U.S. 479, 486 (1950).

- V. The accused has no power to compel incriminating testimony from a witness who claims his Fifth Amendment right.

(Tr. 156-57, 207, 209-14)

In his opening statement to the jury, Morrison's counsel, precipitously, at it turned out, announced that the defense would call Robert Lee Hoffman who would testify that he did not receive money from Brooks on April 7, 1964, and that he had never received narcotics from the defendant (Tr. 156-57). Although the jurors knew his intention, counsel asked that they be excused from the courtroom so Hoffman could be brought before the Court and "have his rights explained to him" (Tr. 207). After the jury was excused, the Court ascertained that the witness Hoffman believed his testimony would incriminate him and, in the circumstances of this case, refused to compel any testimony from him about the April 7 transfer (Tr. 211-14). See Argument IV, *supra*. Counsel asserted that the Government had a duty to offer Hoffman immunity from prosecution so his testimony could be compelled and moved the Court to see that the duty was observed (Tr. 210-11).²⁰

The congressional purpose in enacting immunity statutes has always been to aid law enforcement by making evidence available to the Government that would ordinarily be privileged under the Fifth Amendment.²¹ See, e.g., *Reina v. United States*, 364 U.S. 507, 511-12 (1960); *Smith v. United States*, 337 U.S. 137, 146 (1948); *United States v. Monia*, 317 U.S. 424, 430 (1942); *Heike v. United States*, 227 U.S. 131, 142 (1913); 8 Wigmore, Evidence (McNaughton rev. 1961) § 2281, p. 492. With

²⁰ Defense counsel recognized the possibility that Hoffman's testimony might result in a new indictment, but contended that it could not result in a conviction under *Ross v. United States*, *supra* (Tr. 209-10). See Argument II, *supra*.

²¹ Because a witness is assured of immunity from criminal penalty, the argument runs, he cannot incriminate himself and may, therefore, be compelled to testify. See *Brown v. Walker*, 161 U.S. 591, 595-97 (1896).

reference to the immunity statute sought by the appellant here for his own use, the Supreme Court has pointed out that it was enacted by Congress for the "*more effective enforcement* of the undoubted power [of Congress] to enact the narcotic laws." *Reina v. United States*, *supra* at 511. (Emphasis added.) And, as Mr. Justice Holmes stated for the Court in *Heike v. United States*, *supra* at 142, an immunity statute should be construed to achieve the obvious congressional intent to enable the Government to obtain evidence otherwise inaccessible to it. Forgetting for a moment that the statute here, 18 U.S.C. § 1406, expressly permits only the United States Attorney, upon approval of the Attorney General, to grant a witness immunity from prosecution under certain narcotic statutes, could the intent of Congress to provide more effective law enforcement be achieved if an accused had the power to grant—or to cause the Government to grant—immunity to the witnesses he sought to call in his behalf?

That question was answered in a number of cases arising under loosely worded statutes that appeared to give the accused, as well as the Government, the right to call witnesses and compel their testimony by granting them immunity from prosecution on the subject matter of it. Under the National Prohibition Act, an immunity statute provided that any duly subpoenaed witness could neither refuse to testify nor be prosecuted on the subject of his revelations. Congress did not specify that the witness had to be called by the Government, and several defendants sought to compel the testimony of their own witnesses by granting them immunity under the statute. In *Brady v. United States*, 39 F.2d 312, 314 (8th Cir. 1930), the Court noted that the statute literally seemed to apply to all witnesses subpoenaed to testify on the subject of the prohibition laws, but held that "properly construed" in the light of its purpose, it applied only to witnesses subpoenaed by the Government. And in *United States v. Ernest*, 280 Fed. 515, 516-17 (D. Mont. 1922), the Court arrived at the same holding after vividly pointing to the

possibility of collusion between an accused and the witnesses he seeks to immunize:

A. and B., jointly accused and tried, each could refrain from testifying for himself, but could subpoena and call the other, both testify as witnesses only, and the case would end in dismissal as to both, a judicial farce. Of the six involved, one known, accused, and tried could subpoena and call the others, and confer upon them an immunity bath. The settled law rejects construction involving absurd and unjust consequences, if any other construction be reasonably possible.

Accord, *State v. Perry*, 69 N.W. 2d 412, 418-20 (Iowa, 1955); *Smith v. United States*, 58 F.2d 735, 736 (5th Cir. 1932); *State v. Archambault*, 232 Pac. 1107 (Mont. 1925); see 8 Wigmore, Evidence (McNaughton rev. 1961) § 2282, p. 519. The possibility of collusion between witnesses seeking immunity, and defendants seeking acquittals, is obvious; and no court has yet found that Congress intended to enforce its laws more effectively by creating a situation as thoroughly fraught with collusive possibilities as the one giving the accused a power to grant immunity to the witnesses he produces.

Of the two statutes relied upon by the appellant in support of his alleged right to compel Hoffman's testimony, 18 U.S.C. § 1406 provides expressly that only the United States Attorney, in the public interest and with the approval of the Attorney General,²² may authorize immunity for a witness. Nothing in the language of the statute, or in the furtherance of the congressional purpose as previously discussed, lends support to the view that Morrison could grant—or, what is the same thing, force the Government to grant—Hoffman immunity from

²² The executive determination of when, and whether to grant the immunity provided for in 18 U.S.C. § 1406 is not reviewable by the courts. *Ullman v. United States*, 350 U.S. 422, 431-34 (1955); *In re Bart*, 113 U.S. App. D.C. 54, 58, 304 F.2d 631, 635 (1962). A reasonable corollary would appear to be that the determination is equally unreviewable by the accused.

prosecution on the April 7 transaction. Like any other witness, Hoffman was free to waive his Fifth Amendment objection and to testify; and Morrison, like any other accused, was free to call Hoffman as a witness but not to force him to incriminate himself.

The second statute under which the appellant claims that Hoffman should have been granted immunity is 23 D.C. Code § 110;²³ he concedes that this statutory provision appears applicable only when there are co-defendants on trial, but urges this Court to construe the section to give the trial judge authority to immunize from prosecution a participant in the crime who is not presently under indictment. See Appellant's Brief, p. 29. It is enough to say that the statute only provides for the discharge of a co-defendant (a condition not here present) so that he may testify for the accused *after* the Government has failed to present sufficient evidence to withstand a directed verdict of acquittal. The prosecution here, of course, was not directed toward Hoffman; yet, had it been, there was sufficient evidence to put him on his defense, and, therefore, to deny him an immediate verdict.

VI. The Government's failure to call the defendant's co-indictee as a witness does not justify a missing witness instruction.

(See Tr. 272-76)

At the close of the evidence, defense counsel requested the Court to instruct the jury that the Government's failure to call Hoffman as a witness, or to grant him immunity from prosecution when the defendant tried to call him, justified the inference that his testimony would not have supported the prosecution's theory of the case (Tr. 272-76). The trial judge declined to give the instruction, saying that Hoffman "was just as available to you [the defendant] as to the Government" (Tr. 273).

²³ Appellant did not refer to this Code provision or request the trial judge to take any action pursuant to it.

When the uncalled witness is *available* to both parties, no instruction of the sort requested here by the appellant is warranted against either the Government or the defense. See, e.g., *Milton v. United States*, 71 App. D.C. 394, 397, 110 F.2d 556, 559 (1940); *Culp v. Repper*, 64 App. D.C. 337, 78 F.2d 221, 223 (1935); *Egan v. United States*, 52 App. D.C. 384, 395-96, 287 F.2d 958, 969-70 (1923). The parties may, however, argue the inference to the jury. See *United States v. Cotter*, 60 F.2d 689, 691-92 (2d Cir. 1932); 2 Wigmore, Evidence (3d ed. 1940), § 288, pp. 169-71. In no event should the instruction be given unless the uncalled witness would be expected to favor the side against whom the inference is drawn. *Pennewell v. United States*, D.C. Cir. No. 18,962, decided November 9, 1965; *United States v. Llamas*, 280 F.2d 392, 393-94 (2d Cir. 1960); see McCormick, Evidence (1954), § 249, p. 534; Wigmore, Evidence (3d ed. 1940), § 287, p. 168. Applying these principles to the instant case, the missing witness instruction was properly denied because Hoffman was equally accessible to call by the parties, and, also, because he may be thought to have a more natural alignment of interests with Morrison, his co-indictee, than with the Government.²⁴

Nor should the prosecutor's refusal to grant Hoffman immunity be the subject of an inference that the Government has prevented his testimony because it would not have corroborated Officer Brooks'. Such a conclusion ignores the multifarious considerations that must go into that determination—as well as the fact that the prosecuting officer does not control the grant because it also needs the approval of the Attorney General.

²⁴ The logical inference would seem to be that the *accused's* failure to call his co-defendant, or co-indictee, signifies that such testimony would be adverse. See *Cole v. State*, 183 Pac. 734, 736 (Okla. 1919); 8 Wigmore Evidence (McNaughten rev. 1961), § 2273, p. 451.

VII. The prosecutor's response to an argument by defense counsel that the Government should have called Hoffman as its witness was not reversible error.

(See Tr. 306-307, 316-318, 272.)

Attempting to create a reasonable doubt in the jurors' minds as to Morrison's guilt, his trial counsel argued in summation that the Government's case was incomplete insofar as Robert Hoffman had not been called to testify (Tr. 306-07). He knew, of course, that such testimony was not available because Hoffman had invoked the Fifth Amendment. Nevertheless, he told the jury: "[Y]ou should demand . . . this direct evidence [before concluding that Morrison is guilty] (Tr. 307). In rebuttal, the prosecutor answered this argument by saying that Hoffman was available to the defense as well as to the prosecution, and asked further why the defendant had not called him to the stand (Tr. 316). The Court interrupted and asked both counsel if they objected to a clarification of Hoffman's role at the trial (Tr. 316). Defense counsel replied that he had no objection—earlier in the trial he had expressed his view that the jury should be informed about the whole matter (Tr. 272)—and the jurors were told that Morrison had called Hoffman as a witness but that the latter had refused to testify (Tr. 317).²⁵ As defense counsel again expressed his satisfaction with the Court's clarification, the incident case to a close (Tr. 318).

When counsel for Morrison chose to argue to the jury that the Government should have called the co-indictee, he opened the door to comment by the prosecutor on the subject. The reasons for *not* drawing an unfavorable inference against the Government included the fact that Hoffman was as accessible to the defense as to the prose-

²⁵ If counsel had not agreed to this procedure, and found it suited to his tactics, he might have requested the Court to merely instruct the jurors to disregard the prosecutor's argument.

cution and, therefore, no evidence was being withheld.²⁶ There were two ways in which the prosecutor could have met the defense argument: either by presenting the fact that the witness, a potential defendant, would ordinarily be called by an innocent accused, or by arguing that the witness had refused to testify and was, therefore, inaccessible to both parties. Since this Court has said that the refusal to testify by a witness "cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant,"²⁷ Government counsel was understandably hesitant to disclose that Hoffman had invoked his personal right under the Fifth Amendment. He therefore decided to answer the defense summation by pointing out that Hoffman was as accessible (or inaccessible) to one party as to the other. This was an entirely proper response—although it ignored what had occurred outside the jury's presence in an effort to avoid prejudice to the defense—to the defendant's questionable contention that the inference should have been drawn against the Government. The defendant invited the reply he received. See *Lawn v. United States*, 355 U.S. 339, 359 n. 15 (1957).

If there was any impropriety in the reply by Government counsel, it was remedied to the defendant's satisfaction by the Court (Tr. 317-18). The appellee, submits, therefore, that this isolated incident, provoked by the defense, did not deprive the defendant of a fair trial. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *Isaacs v. United States*, 301

²⁶ This was the purport of the prosecutor's remarks that the defense could have called Hoffman to testify if it had chosen to do so. In fact, of course, the witness had been called out of the jury's presence and had refused to testify by exercising a right controlled by neither the Government nor the defendant. The better practice in such cases would be to curtail all comment by counsel on the subject. However, if one party argues the point, the other must remain free to answer it.

²⁷ *Billeci v. United States*, 87 U.S. App. D.C. 274, 278, 184 F.2d 394, 397 (1950).

F.2d 706, 736-39 (8th Cir. 1962). The case of *Berger v. United States*, 295 U.S. 78 (1935), relied upon by the appellant, is inapposite. The prosecutor there had engaged in a series of improprieties that find no counterpart in the record of the present case.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the District Court should be affirmed.

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CHARLES L. OWEN,
Assistant United States Attorneys.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,325

ALVIN T. MORRISON,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 22 1966

Nathan J. Paulson
CLERK

APPELLANT'S PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALVIN T. MORRISON, :
 :
 Appellant :
 V. : No. 19,325
 :
 UNITED STATES OF AMERICA, :
 :
 Appellee :

APPELLANT'S PETITION FOR REHEARING EN BANC

Comes now the appellant, by and through his attorney,
and respectfully petitions the Court to grant a rehearing
en banc.

The principal questions presented for review are:

(1), the denial of due process resulting from the un-
warranted delay of five months and three days from the
alleged offense to the complaint, compounded by an
additional delay of six months until trial which pre-
cluded the accused from presenting an adequate defense,
coupled with the non-availability of an essential witness,
whose non-availability was attributable solely to the
government, and related questions from Ross v. United
States, U.S. Appeals, D.C. No. 17,877, 349 F.2d 210 (1965);
and, (2), the questions arising from the refusal of the
government to grant immunity to an essential witness

and the refusal of the trial judge to grant the requested instruction on the missing witness and the improper argument by the prosecutor that the defendant could have called the witness.

This second question goes far beyond the issues presented in Earl v. United States, No. 19,316, decided by the same panel as the instant case, in which petition for rehearing was denied on August 16, 1966. This is a crucial question, and in the posture of this case, goes to the very heart of our adversary system.

It is further asserted that the issues arising from Ross, supra, and related cases, decided since June 30, 1965 make it imperative that the entire Court examine and illuminate the present confusion among counsel, both for the government and for the defense. The numerous Ross cases which have been decided would indicate an intracircuit conflict, culminating most recently in Woody v. United States, No. 17,965, decided April 12, 1966, opinions filed, August 11, 1966, in which each member of the panel wrote an opinion.

I. The Ross Question

This case presents the classic Ross situation, the undercover agent using the ever-present notebook to refresh his recollection as to one of his 93 transactions; a delay of 5 months and 3 days from the

alleged purchase to the sworn complaint; the defendant, unable to recall where he was at a day and time certain some eleven months prior to trial. More crucially, however, are the inconsistencies in the undercover agent's testimony, particularly as to identification of the defendant, named as "John Doe" at the time of the purchase and the discrepancy as to the time of the sale. The notebook of the officer further revealed two transactions at the exact same time between entirely different parties, both in his presence and witnessed by him.

The panel distinguishes this situation from Ross, supra, who "had no regular employment;" yet, Morrison worked seven nights a week from 8:00 p.m. until 2:00 a.m. and each day was essentially like the ones preceding and the ones that followed. Would not his days be less eventful and more difficult to recall than the unemployed Ross?

The opinion by the panel further noted that the narcotics agent saw and recognized appellant on numerous occasions. This was after the alleged transaction, in Morrison's regular place of employment and not in connection with any narcotic transactions. If this be corroboration, it was self-serving at best, particularly when his original description of the

accused was so at variance with his actual physical appearance.

The most important single factor in this chain of circumstances which emphasizes the unreliability of the identification and the conviction is that these three capsules, the possession of which the appellant stands convicted, were received by a police informer from one Hoffman and not from the appellant. Hoffman was a co-defendant, but his indictment was dismissed. The government's evidence showed that Hoffman received the capsules from the appellant and gave them to the informer, all of which was witnessed by the police officer who, at the same time, was observing another transaction.

This last factor provides a stronger fact situation than Ross, yet it was not discussed by the panel.

It is strongly urged that this entire question be re-examined by the Court en banc, commencing with Nickens v. United States, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963) up to and including Woody, *supra*.

II. The Earl Question

The second question urged for rehearing arose almost identically in Earl v. United States, No. 19,316, decided April 19, 1966, by the same panel as the instant

case. Rehearing was denied by a vote of 4 to 4 on August 19, 1966. There are, however, several dissimilarities, discussed at length by the panel in Morrison which should be considered by the entire Court.

At trial, the government introduced Hoffman as a possible witness. He was not called as a witness, but was called by the defense. His rights against self-incrimination were explained, and even though his indictment for this transaction had been dismissed, he refused to testify.

As in Earl, trial counsel made a proffer of testimony favorable to the accused and requested that the government grant the witness immunity under Title 18 U.S.C.A. 1406 (1964), which provides for immunity when the testimony ". . . is necessary to the public interest." The government declined.

Counsel for the defense requested that the court grant immunity to the former co-defendant under D. C. Code, Title 23-110. This, too, was refused.

The defendant's counsel then, at the conclusion of the evidence, requested an instruction on the missing witness in that Hoffman was "peculiarly within the control" of the government and, since

he was not called, the defendant was entitled to the inference that his testimony would not have favored the government. This was refused; however, the trial court gave defendant's counsel permission to argue these facts to the jury. This he did -- only then to be met by the prosecutor's argument to the jury that "Why doesn't he call Hoffman? . . . This man is as available to him and he could have called him as a witness."

That argument was false, misleading and highly prejudicial and could not be corrected by the court's instructions.

This issue is directly related to the denial of due process under the Ross question in that the primary purpose of a trial, under our system of law is to seek the truth. Justice cannot function in a vacuum and requires the diligent efforts of lawyers, both prosecution and defense, to establish the truth with a high regard for their duties as officers of the court. The trial judge has, of course, a higher duty in his role as arbiter, otherwise this elusive spectre, truth, be lost and justice thwarted.

Here, the one man who, according to the government's case, had the direct knowledge of what transpired on

the day in question was not called by the government and could not be called by the defense. Surely, if truth were the goal in this trial, its course was too easily frustrated.

It is asserted that counsel for the government had a duty to make this witness available to the defense, due to the alleged participation of the witness in the transaction. The prosecutor was in a unique position of total control over the witness. Such a position is tantamount to the possession of exculpatory evidence which the government withholds from the defense. This Court has held that the government has a duty to reveal such information. In Griffin v. United States, 87 U.S. App. D.C. 172, 183 F.2d 990,993 (1950), the Court held,

However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. "The U.S. attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done." Berger v. U.S. 295 U.S. 78, 88.

Certainly, after the government's refusal to call the witness and to permit him to be called by the

defense, the accused was entitled to the missing witness instruction. This being denied, the defense was finally prejudiced by the improper argument by the prosecutor that the witness should have been called by the defendant.

As the Supreme Court stated in Berger v. United States, 295 U.S. 78, 88 (1935), the U.S. attorney ". . . may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

For the reasons set forth above, the appellant respectfully petitions that the appeal in this case be heard by the court sitting en banc.

Respectfully submitted,

J. Gordon Forester, Jr.
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Attorney for Appellant
Appointed by the District Court

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I, J. Gordon Forester, Jr., attorney for appellant,
certify that this petition is presented in good faith,
that it is not interposed for delay, and that, in my
judgment, the petition for rehearing is well founded.

J. Gordon Forester, Jr.